Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF OF FLORIDA TILE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

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Petitioner, Florida Tile Company ("Florida Tile"), submits this supplemental brief in support of its petition for a writ of certiorari filed in this Court on May 9, 1983. This brief is intended solely to call attention to the impact of this Court's decision in *NLRB* v. *Transportation Management Co.*, 103 S. Ct. 2469 (June 15, 1983) on the pending petition.

In its petition, Florida Tile contended that the Court's decision in *Transportation Management* would "bring order out of the burden of proof chaos" which had existed in cases under Section 8(a)(3) of the National Labor Rela-

tions Act ("NLRA") involving an examination of an employer's motive for an alleged discriminatory discharge or adverse personnel action (Pet. 10, 27). The Court's decision confirms Florida Tile's contention. The legal and factual analysis in *Transportation Management* provides additional support for the granting of the petition in this case.

1. Although the legal issue in *Transportation Management* concerned the burden of proof in Section 8(a)(3) cases where the National Labor Relations Board ("NLRB") finds that an employer had both a "good motive" and a "bad motive" for a personnel action, the Court—as anticipated in our petition—also discussed the appropriate burden of proof in the "pretext" situation where, as here, "the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." 103 S. Ct. at 2473 n.5.

The Court in *Transportation Management* made clear that at all times in a Section 8(a)(3) proceeding, the burden of proof stays with the NLRB General Counsel to prove that an employer's legitimate, non-discriminatory reasons for a personnel action are pretextual. The Court stated as follows:

> The Board has not purported to shift the burden of persuasion on the question of whether the employer fired Santillo [the employee] at least in part because he engaged in protected activities. The General Counsel satisfied his burden in this respect and no one disputes it. Thus, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 . . . (1981), is inapposite. In that case, which involved a claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the question was who had "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. . . ."

> 450 U.S. 253. . . . The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision. It thus addressed the pretext case.

103 S. Ct. at 2473 n.5.

The Court's treatment of pretext in *Transportation Management* leaves no doubt that the NLRB General Counsel has the burden of persuasion on that issue. As stated in our petition, the "Court should grant review in this case to make clear that the confusion surrounding the burden of proof question has not been limited solely to pure 'dual motive' cases but [has extended] to all Section 8(a)(3) cases implicating employer motivation, including 'pretext' cases" (Pet. 18).

2. The facts stressed by the Court in *Transportation Management* highlight the differences between that case and this one and emphasize the need for the judgment in this case to be reviewed according to the proper burden of proof standard. The Court in *Transportation Management* stated, *inter alia*, as follows:

> At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it never even expressed its disapproval of his conduct.

103 S. Ct. at 2476.

By contrast, in this case, Florida Tile's decision to discharge Connie Beavers did not constitute a departure from its normal practice in dealing with rules infractions.

Prior to Beavers' discharge, Florida Tile had discharged employees in circumstances similar to those involving Beavers' discharge (Pet. 25-26; JA-597-608). Further, the company conducted a full and fair investigation of the events that culminated in Beavers' discharge (Pet. 6-7). Finally, unlike the employee's commonplace practice in *Transportation Management* of leaving keys in a bus that the employer seized upon as grounds for discharge, Beavers' excessive and vicious sexually-charged profanity that led to her discharge was uttered in a manner which witnesses testified had never been seen or heard at Florida Tile's plant (Pet. 5, 25-26 & n.22).

Under the burden of proof allocation delineated and clarified in *Transportation Management*, Florida Tile's discharge of Connie Beavers was not discriminatory within the meaning of Section 8(a)(3) of the NLRA. If Florida Tile's case were before the court of appeals for the first time, a different result would obtain in light of *Transportation Management*. Therefore, we respectful-

ly urge this Court to vacate the judgment below in light of *Transportation Management* (Pet. 27). Florida Tile respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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September 1983